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No. 70-205

# In the Supreme Court of the United States

OCTOBER TERM, 1971

MONROE CAINE, ET AL., PETITIONERS

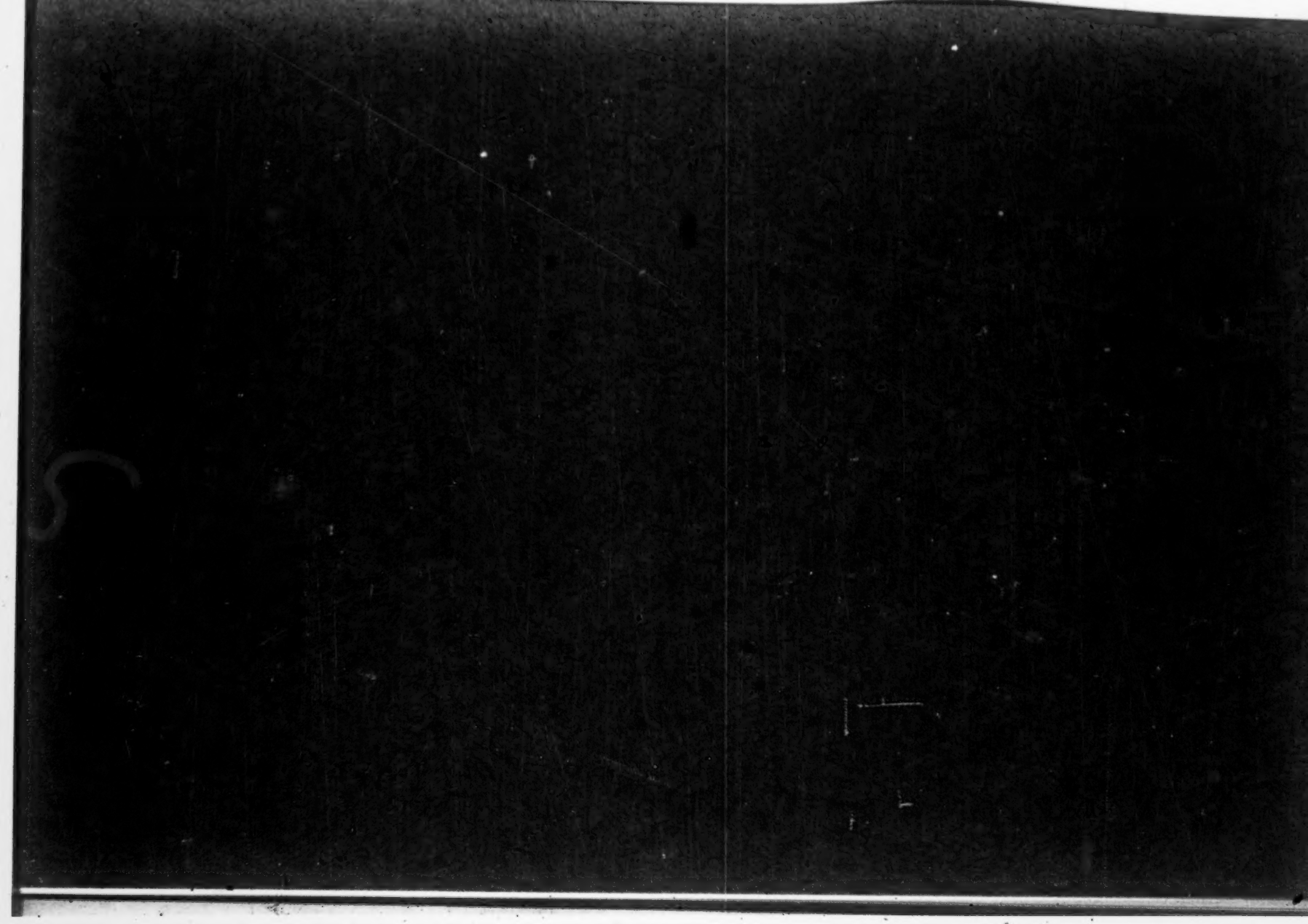
v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
*Solicitor General,*
*Department of Justice,*
*Washington, D. C. 20530*



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Following a jury trial in the United States District Court for the Southern District of New York, petitioners were found guilty upon 72 counts of an 85-count indictment (App. 7-16) charging them with using interstate wire facilities and the mails in furtherance of a scheme to defraud, in violation of 18 U.S.C. 1341 and 1343. Petitioners Caine and Ratke were sentenced to concurrent four-year terms of imprisonment on each count and fined $2,000 plus one-

third of the prosecution costs. Petitioner Fino was sentenced to concurrent one-year terms of imprisonment on each count and fined $1,000 plus one-third of the prosecution costs. The court of appeals affirmed (Pet. App. A).

The facts are not in dispute and are summarized in the opinion of the court of appeals. The evidence shows that petitioners had formed the Sperry Dynamics Corporation in order to market the "Sperry Unitron," an alleged gas-saving device for automobiles. This device was advertised on a massive scale, with many false claims being advanced. For example, the advertisements referred to Unitron as a new invention by one of America's leading scientists, when, in fact, it was the product of a relatively unknown inventor who worked out of his garage. Unitron was also described as a device to "install" or "insert" in the automobile engine; no disclosure was made that it was actually a six-ounce can of engine detergent to be added to the fuel supply at the rate of one ounce for every five gallons of gasoline. It was further advertised that tests had proved that the device would enable the customer to get up to 33 to 37 miles per gallon (App. 171-172); the falseness of this claim was established both by the results of tests (App. 78) and by the testimony of purchasers to the effect that the "device" provided absolutely no increase in gas mileage (App. 84). Another aspect of the scheme was the failure to ship the product after cashing the purchasers' checks. In addition, many claims for refunds (which were offered in the advertising material) were ignored. During Sperry's

two-year operation, petitioners grossed more than $1,300,000 on this $4.95 item (App. 171).

The first count of the indictment, in a four and one-half page introduction, detailed the scheme. It alleged that the petitioners devised a scheme to defraud for the purpose of obtaining money by means of false pretenses and that as a part of the scheme petitioners would solicit sales of Unitrons by means of advertising. It was further alleged that this advertising contained false, fraudulent and misleading statements, "including among others" twelve listed false claims in the advertising (App. 8-9); this list did not include the false claim that petitioners would give refunds.

1. Petitioners' primary complaint is that the government improperly went beyond the charges contained in the indictment by introducing evidence of fraudulent misrepresentations regarding the refunds. This claim is without merit. The gravamen of the charged offense is the devising of a scheme to defraud —not the making of a false statement. Under such a charge the government need not allege in the indictment every false representation contained in the advertising. *United States* v. *Brunet*, 227 F. Supp. 766, 771 (W.D. Wis.). See *United States* v. *Sprinkle*, 57 F. 2d 968, 969 (C.A. 2); *United States* v. *Caine*, 270 F. Supp. 801, 803, 804, 806 (S.D.N.Y.); *United States* v. *Pilnick*, 267 F. Supp. 791, 795, 801 (S.D. N.Y.).[1]

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[1] The trial judge ruled in the present case that the advertisement's fraudulent promise to pay refunds was properly

2. As pointed out in the opinion of the court of appeals, the claim that the petitioners were taken by surprise by the evidence concerning refunds is insubstantial (see Pet. App. A4-A5). Defense counsel was furnished a copy of the subject advertisement one year prior to trial (App. 58).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

JULY 1971.

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raised by the allegation that "said advertising" contained false and fraudulent representations other than the twelve listed items (App. 36-55).

Petitioners' reliance on *United States* v. *Varner*, 283 F. 2d 900 (C.A. 7), and *United States* v. *Pope*, 189 F. Supp. 12 (S.D.N.Y.), is misplaced. Neither is a mail fraud case. Moreover, this case lacks the danger of surprise involved in *Pope* and the possibility of conviction on charges or theories not underlying the indictment present in both *Varner* and *Pope*.

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